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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 201

DAVID HYUN, PETITIONER

v.

HERMAN R. LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A; R. 46) is reported at 219 F.2d 404.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1955 (R. 54). Rehearing was denied on April 7, 1955 (R. 55). The petition for a writ of certiorari was filed on July 1, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case it was an abridgment of procedural due process to admit into evidence, in a deportation proceeding in Los Angeles, testimony of witnesses taken by deposition in Honolulu.

STATEMENT

This habeas corpus proceeding arose as a challenge to a deportation order (Pet. App. B & C), based on membership in the Communist Party, which was affirmed by the Board of Immigration Appeals (Pet. App. D). The District Court for the Southern District of California denied the petition for the writ (Pet. App. E) and its action was affirmed on appeal (Pet. App. A).

Petitioner, a native of Korea, was admitted to the United States at Honolulu, Territory of Hawaii, on May 26, 1924 (R. App. 86).[1] He was admitted to the continental United States at Los Angeles, California, on September 1, 1947 (R. App. 84). A warrant for his arrest in deportation proceedings, issued October 31, 1950, charged him with being an alien, who, after entry, had been a member of the Communist Party of the United States (R. App. 262).

At the first hearing on November 22, 1950 (R. App. 69-96), the hearing officer questioned the alien carefully as to whether he understood the nature

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[1] "R. App." refers to the Appendix filed by the petitioner which contains the proceedings before the immigration authorities.

of the charge against him (R. App. 72, 74). Petitioner was called as a witness but declined to answer any personal history questions or to state whether he had ever been a member of the Communist Party on the grounds that he might incriminate himself (R. App. 80-88). He also refused on the grounds that his counsel had not had time to prepare his case, even though, as noted by the hearing officer, his counsel had first entered an appearance in this proceeding on August 9, 1949 (R. App. 77).

The government then entered a motion to take depositions in Honolulu (R. App. 89). Before ruling on the motion, the hearing officer offered petitioner's counsel an opportunity to go into any matter having a bearing on the issue in the case (R. App. 89), to present witnesses, and to develop any evidence he so desired (R. App. 90). Petitioner's counsel insisted he was not prepared and wanted a continuance, and that the entire proceedings were in violation of law, in that the warrant of arrest was improperly served (R. App. 90). The motion to take the depositions was then granted (R. App. 93). The hearing officer informed petitioner that he would be notified of the date and time witnesses would appear at the office of the Immigration and Naturalization Service in Honolulu (R. App. 93). He also told petitioner that he could be represented there by counsel, present witnesses, and submit interrogatories to be propounded to the witnesses (R. App. 93). Petitioner's counsel objected to the ruling as arbitrary and unfair and stated that he did

not see why the depositions could not be taken in Los Angeles or why petitioner or his counsel or both should not be present in Honolulu at the government's expense (R. App. 94). Counsel made no mention of any financial inability on petitioner's part to attend or be represented in Honolulu. He did not allege that petitioner wished to confront the witnesses personally.

The depositions were taken in Honolulu on December 18, 1950 (R. App. 268), with notice served to petitioner of the time and date. The record reveals this statement made by the examining officer at the time the depositions were taken (R. App. 268):

> And further I have been advised by attorney Symonds of the firm of Bouslog and Symonds that he has been in communication with Mr. Tyre and had originally intended to enter an appearance here. However, I have just been advised by Mr. Symonds that he does not desire to enter an appearance, nor does he desire to cross-examine the deponents today.

Mr. Tyre was petitioner's counsel at all the administrative hearings. Petitioner did not present any witnesses or interrogatories at Honolulu.

Two of the witnesses whose depositions were taken had been officers in the Communist Party in Hawaii during the time they stated they knew petitioner (R. App. 276, 306). They each testified that they saw him in attendance at several closed Communist meetings. The witness Izuka, who was

trained at a Communist training school in San Francisco (R. App. 302, 303) and was a Communist from 1938-1946, testified in detail as to the organization of the Communist Party in Hawaii (R. App. 303-304). Izuka specifically placed petitioner at three meetings of the executive board of the Communist Party in Hawaii (R. App. 291, 294, 295, 296), and recalled conversations he had had with him on Communist matters at two of the meetings (R. App. 296, 297). He recalled also a dispute within the Communist Party over the firing of a party worker in which petitioner engaged (R. App. 301). Izuka stated that he knew petitioner socially (R. App. 299, 300, 301) and as a member of the executive board of the Communist Party in Hawaii (R. App. 310).

The depositions were offered into evidence at the reopened hearing at Los Angeles on March 13, 1951 (R. App. 97). Although counsel for petitioner had had a copy of the depositions since January 1, 1951 (R. App. 104), the hearing officer granted a 15-day continuance (R. App. 102) in order that petitioner himself could see and study the depositions (R. App. 107). The hearing officer stated (R. App. 107):

> * * * this is Mr. Hyun's hearing and I am going to see that he gets a hearing and that he has every opportunity to comment on any of the evidence.

At the reopened hearing on March 28 and 29, 1951, petitioner's counsel objected generally to admission of the depositions into evidence because

counsel and petitioner had not been allowed expenses to Hawaii to confront the witnesses (R. App. 109, 110). Counsel for petitioner gave as his reason for not submitting any cross-interrogatories (R. App. 112):

> I mean that it was impractical for David Hyun to be represented in Honolulu by another lawyer to cross examine witnesses without the presence of Mr. Hyun to assist in such cross-examination, or at least without the presence of his own counsel, which I think in itself would have been inadequate.

The examining officer noted that petitioner could have been present under guard at his own expense but that he had not so requested (R. App. 114). Petitioner's counsel entered specific objections to certain answers and questions contained in the depositions, all of which were overruled (R. App. 115-217). Petitioner declined to answer questions as to Communist affiliations on the grounds that he might incriminate himself. On the same basis he declined to state whether he knew the government's witnesses (R. App. 230-233).

At the close of the government's case, a continuance was granted so that petitioner's counsel could ascertain what evidence he wished to present (R. App. 238). At the reopened hearing on April 19, 1951, petitioner offered no witnesses in his behalf, but did seek another continuance to find a witness to testify as to the character of the Communist Party (R. App. 250). This request was denied on

the ground that the character of the Communist Party was not in issue (R. 252).

The hearing officer found on the basis of the uncontroverted evidence in the depositions that petitioner had been a member of the Communist Party and recommended deportation (Pet. App. B, 11-15). This recommendation was adopted by an assistant commissioner of the Immigration and Naturalization Service (Pet. App. C, 16-20), and affirmed by the Board of Immigration Appeals (Pet. App. D, 21-24).

ARGUMENT

Arguing from the established principles that deportation proceedings must accord an alien due process and that normally a requisite of fairness is presence of the alien at the hearing, petitioner, who was present at each of the five hearings accorded him in Los Angeles, contends nevertheless that the use of deposition testimony deprived him of due process. In so doing, he confuses the right of confrontation with the right to be present at a hearing. In any civil case, testimony may be taken by deposition. Rule 26(d)(3), F. R. Civil P., allows the use of depositions upon due notice to the adverse party if the witness is at a greater distance than 100 miles from the place of hearing. Since deportation proceedings are civil in nature,[2] the use of deposition testimony in such hearings does not, in itself, violate due process. *Berkman* v. *Tilling-*

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[2] *Carlson* v. *Landon*, 342 U.S. 524, 537; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594.

hast, 58 F. 2d 621, 622 (C.A. 1); *Bhagat Singh* v. *McGrath*, 104 F. 2d 122, 123 (C.A. 9).

And there was nothing basically unfair in the use of deposition testimony in this particular case. Petitioner had the opportunity to protect his interests at the time of the taking of the depositions by employing counsel in Honolulu to represent him and was so informed by the hearing officer at the time the motion to take depositions was granted. He was given full opportunity to prepare cross interrogatories and present his own witness (R. App. 93). There is no showing (nor was there a claim in the administrative proceeding) that he was unable to employ counsel in Honolulu if he wished to do so; the indications are to the contrary (see Statement, *supra*, pp. 4, 6). Petitioner was also informed that, had he requested the right to attend the taking of the depositions in Honolulu, he could have done so under guard and at his own expense (R. App. 114). Although this was after the depositions had been taken, it was in time for him to be present at a cross-examination of the witnesses. And while such a proceeding would undoubtedly have been expensive, petitioner did not allege that he was financially [3] or physically unable to go to Honolulu.

In any event, there is no showing that the right to be represented by counsel, prepare cross-interrogatories, and present witnesses at the time of the

[3] Financial inability to attend the taking of depositions has been held not to be a denial of the right to cross-examination. *Bhagat Singh* v. *McGrath*, 104 F. 2d 122, 123 (C.A. 9).

depositions, would be, or was, inadequate to preserve petitioner's right to a fair hearing. There is no claim of mistaken identity on the part of the witnesses, and their testimony fully supported the administrative findings (see Statement, *supra*, pp. 4-5). Petitioner denied none of the testimony presented by the government although he testified after the government's evidence was concluded (R. App. 219-234). Cf. *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-5; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111-112. He presented no witnesses in his behalf. His one affirmative move was to seek another continuance, after being given a ten-day continuance to prepare his defense (R. App. 238), in order to find a witness who could testify as to the character of the Communist Party (R. App. 250), a motion properly denied by the hearing officer as not relevant (R. App. 252). This was the sum and substance of petitioner's defense to the charge of Communist Party membership as against the positive identification of petitioner in the government's evidence. On the whole record, it seems reasonable to infer that petitioner deliberately failed to participate in the depositions because he felt he had nothing to gain by so doing.

CONCLUSION

The decision below is correct and there is no conflict on the issue presented. We respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1955
No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY MEMORANDUM

So far as it treats of the deprivation of fair hearing at all, the Government appears to suggest largely that it is excuse enough for a bad and unconstitutional hearing that in its opinion in likelihood the petitioner was a "bad" individual and was in probability deportable on supposed (but never fairly tried) charges. The position is that the Constitutional rights of fair hearing exist only for those whose certainty of acquittal is so evident without trial as to make needless, or largely so, the safeguards of fair hearing established by the Constitution as a process for arriving within the law at the very judgment thus

extra-legally assumed. This totally inverts the Constitution and the rights of hearing and destroys due process of law. In the apt words of *United States v. Morgan* (2d Cir.), 222 F. 2d (Adv. Ops.) 673, 675, "Such reasoning would warrant punishment before trial. . . ."

The substance of the matter is that the Government has avoided the Constitutional issue because it has no valid answer. So shocking is the concept of tearing a man from his family and deporting and exiling him without even affording him the dignity of fairness of insured presence at his hearing that response by avoidance rather than reply is preferable.

The Government does attempt to excuse the denial of presence at bar by invoking the assertion that deportation proceedings are "civil" in character rather than criminal. From this the Government would urge, both being "civil", that deportation hearings need afford no greater rights of hearing than those required in a civil default for potatoes sold and delivered, and that in consequence presence no more than any other right of personal liberty is important in or need be observed in deportation proceedings save at government pleasure. But the Constitution is not thus circumvented by generalities or mere turn of words, and particularly not where liberty, not material rights, are issued. Due process of law there is not a matter merely of semantics.

It is the consequence not the form of the judgment which matters in fair hearing, and the short of the principle which governs is that where liberty is at stake society can not *afford* to be careless in hearing or disregardful of rights lest it undermine for all others the rights it fails to secure to any one.

Moreover, the principles of required fair hearing where liberty is at stake apply with particular force and inflexibility where a proposed disregard of protections is without compulsion of necessity and is proposed to serve government convenience only. The disregard of fair hearing below by denying security of presence was government action of *just such character*. Upon this feature of the case the government is silent utterly—because no response is better than any there to be availed of. It offends an inherent sense of fair play, recognizable by all, to permit arbitrary deprivation of fundamental rights, essential to the individual as safeguards of fair hearing, because only such serves the convenience or pleasure of government, or, if honored, might occasion expense incident only to securing a just hearing in proceedings not of the choice of the accused.

Not only does the Government Brief skirt and avoid the true issues of law in the cause at bar, but, as well, its statement of the Record is inaccurate in important respects. It is suggested, for example, that since petitioner "was present at each of the five hearings accorded him in Los Angeles" (Gov. Br. p. 7), his absence from the hearings in Hawaii is a minor thing, and that, in any event, he was represented even there indirectly or in substance by an "attorney Symonds of the firm of Bouslog and Symonds" (as implied at page 4 of the Gov. Br.).

The truth is that the Los Angeles hearings were formalities only, and the entirety of the substantive evidence against petitioner was admitted in Hawaii by deposition without his presence. Presence at the Los Angeles hearings was for all real intents and purposes only presence at the drawing and closing of the curtain; petitioner was excluded from the entire action of the play in between.

And as to the innuendo that petitioner was represented in any measure by "attorney Symonds of the firm of Bouslog and Symonds," the full answer, not quoted by the Government, is set forth in the Record at page 112 (S. R. 112) in the statement of petitioner's true counsel, uncontradicted, that:

> "I want to state clearly for the record at this time that at no time has any attorney in Honolulu or anywhere else ever had the authority either from David Hyun or from me to act as counsel for David Hyun in any part of this particular proceedings that is in deportation proceedings, whether at a deposition or any other hearing. Any statement contained in the Examining Officer's statements which may infer that Mr. Hyun was represented directly or indirectly at those depositions or it was contemplated that he would be represented at those depositions should be negated, as the fact is that he has never been represented nor has he sought representation in Honolulu. The reasons are as previously stated that it was impossible to cross examine witnesses 2500 miles away by another lawyer without the presence of David Hyun himself and/or his lawyer who has handled the proceedings up to that point. I just want to make the record clear on that."

The sole issue of the petition at bar is the minimal right of the accused to physical presence at his hearing in proceedings threatening liberty in most serious manner. Reduced to its essence the Government reply suggests only that any hearing is fair hearing enough for deportations because they are "civil" and that in any event since it believes in the case at bar after an unfair hearing that

petitioner is likely deportable, a fair hearing is not needed and would now be pointless. Neither response is any answer at all in law, reason, or under the Constitution. The Government's position, moreover, plainly foreshadows routine adoption of the practice followed here. Review by this court is thus called for not only by petitioner's just claim to due process protection but by the importance of the question in the administration of the deportation laws.

Conclusion.

It is respectfully submitted the petition for a writ of certiorari should be granted.

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